

**Statement of Mr. Norm Semanko
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**Before the Committee on Natural Resources
Water, Wildlife and Fisheries Subcommittee
U.S. House of Representatives**

**Legislative Hearing on H.J. Res. 29, H.J. Res. 46, H.J. Res. 49 and H.R. 1213
April 18, 2023**

Chairman Bentz, Ranking Member Huffman and Members of the Committee:

Thank you for this opportunity to share observations with you on H.J. Res. 46, which proposes congressional disapproval of the rule submitted by the Biden Administration National Marine Fisheries Service (NMFS) relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designated Habitat”.

Today, I am representing the Family Farm Alliance (Alliance), a grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 16 Western states. We are committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental and national security reasons – many of which are often overlooked in the context of other national policy decisions. The American food consumer nationwide has access to affordable fruits, vegetables, nuts, grains and beef throughout the year largely because of Western irrigated agriculture and the projects that provide water to these farmers and ranchers.

The latest critical habitat rule was finalized in June 2022, essentially rescinding an earlier rule finalized by the previous Administration in 2020. The Alliance strongly supported the 2020 Final Rule promulgated in the Trump Administration and believed that rule’s critical habitat exclusion procedures were necessary to provide greater transparency and certainty for the public and stakeholders. We believe the Biden Administration failed to provide the requisite reasoned explanation for rescinding the 2020 Final Rule and each of the primary substantive provisions of that rule, and we provided detailed formal comments to the U.S. Fish and Wildlife Service (FWS) and NMFS towards that end.

The Family Farm Alliance supports H.J. Res. 46, which formally disapproves of the June 2022 rule and legislates that the rule shall have no force or effect.

PERSONAL BACKGROUND

I serve as the General Counsel of the Alliance, as part of my duties as Office Managing Shareholder of Parsons, Behle and Latimer’s office in Boise, Idaho, where I’m the firm’s water law practice group leader in the Pacific Northwest Region. I have more than 30 years of experience with water resources, environmental, natural resources, land use, public lands and regulatory issues.

I also currently serve as vice chairman of the Litigation Review Committee for the National Water Resources Association (NWRA), and I'm a member of the Litigation Advisory Committee for the Mountain State Legal Foundation. I've served as a past president of NWRA and was previously chairman of NWRA's Federal Affairs Committee. I'm also a former member of the Western States Water Council and the Columbia Basin Partnership Task Force.

I'm pleased to be on the witness dais before you today. I have represented many clients in litigation in federal courts, on issues like the National Environmental Policy Act (NEPA), the Administrative Procedure Act, and the National Forest Management Act. I'm looking forward to sharing my experience dealing with the Endangered Species Act (ESA) and other issues involving salmon and steelhead over the past several decades in the Pacific Northwest.

ESA IMPLEMENTATION IN THE WESTERN U.S.

The federal government's significant presence in the West presents unique challenges for Alliance members. This is particularly true with respect to the reach of the ESA. Implementation of the ESA impacts the management of land and water throughout the West. For example, federal water supplies that were originally developed by the Bureau of Reclamation (Reclamation) primarily to support new irrigation projects have, in recent years, been targeted and redirected to other uses. The result is that these once-certain water supplies – one of the few certainties in Western irrigated agriculture – have now been added to the long list of existing “uncertainties,” negatively impacting the ability of these Western farms and ranches to grow food for this Nation and the world.

Given the nature of water storage and delivery, Alliance members are often directly impacted by the implementation of the ESA and other federal laws. A constant frustration our members experience is the lack of accountability for success or failure from the implementation of these federal laws. There is no empirical measure of the success or failure of mitigation measures (including reasonable and prudent alternatives) or the subsequent adjustment of those measures as a result. The ESA has at times been interpreted to empower federal agencies to take action intended to protect listed species without consideration of the societal costs of such action, even when it is not clear that the action taken will actually yield conservation benefits for the particular species. Thus, the Alliance strongly supports efforts to reform the ESA and its implementing regulations to provide clearer direction to the agencies in applying and enforcing the law.

ALLIANCE ENGAGEMENT ON CRITICAL HABITAT IMPLEMENTATION

The Family Farm Alliance strongly supported the substance and process used to finalize the 2020 ESA rules that have now been rescinded by the Biden Administration, including the rule for designating critical habitat. The Alliance in 2018 convened a team of resources, law, and policy experts familiar with Western water resource management and how this important function is impacted by implementation of federal laws and regulations. Our team developed a 20-page set of recommendations for NMFS and FWS - collectively, the “Services” – as those agencies considered proposed revisions to regulations that 1) implement section 7 of the ESA; 2) extend most of the prohibitions for activities involving endangered species to threatened species; and 3) implement section 4 of the ESA.

During multiple meetings, our team identified several issues for the Services to consider, with the intent to clarify, interpret, and implement portions of the ESA concerning the procedures and criteria used for designating critical habitat. These issues are briefly summarized below.

Economic Impacts

The Services in 2018 proposed removing the phrase “without reference to possible economic or other impacts of such determination.” Although the listing decisions must be made based “solely on the basis of the best scientific and commercial data available,” the ESA does not prohibit the presentation of information on economic and other impacts to the public. We felt removing this phrase was a positive change. In the past, the agencies have conflated the listing decision (which does not consider economic impacts) and other ESA-related decisions (which may consider economic impacts). The agencies would reject economic impact considerations in the latter category, concluding that all economic impacts were accounted for in the listing decision. This is a frustrating and disingenuous treatment of the processes.

Not Prudent Determinations for Critical Habitat

The Services in the previous Administration proposed adding additional circumstances where critical habitat areas under the jurisdiction of the United States provide negligible conservation value for a species that primarily occurs in areas outside of U.S. jurisdiction. We supported this proposal.

Including Man-made Facilities in Critical Habitat Determinations

Another issue that must be resolved and which has created difficulties for some of our members in the past is when critical habitat is designated for man-made structures like reservoirs, canals and ditches.

Consider the critical habitat designated for the Oregon spotted frog in the Deschutes River Basin. Local irrigation districts and municipalities submitted detailed comments and arguments in opposition to USFWS’s proposal to include Wickiup and Crane Prairie reservoirs as critical habitat for the frog. Although the proposed designation excluded “developed areas such as lands covered by buildings, pavement, and other structures” from critical habitat boundaries, it did not exclude existing reservoir operations. Local water users argued at the time of the proposed listing that the “primary constituent elements” (PCEs) for the frog could only be provided in some portions of the Upper Deschutes by modifying existing reservoir operations. This is no different from saying the PCEs in a developed area can only be restored by removing the development.

As is often the case, the arguments made by the water users pretty much fell on deaf ears when it came to the final critical habitat designation. In their final critical habitat designation, USFWS included Wickiup and Crane Prairie reservoirs as critical habitat for the spotted frog. They also included areas and river stretches that “could” support the frog, even though there was no evidence that the frog existed in those locations.

Under the Trump rule, these features would not have qualified as critical habitat, a designation that can cause significant economic impacts when existing water delivery operations are affected. For example, reducing the availability of summertime irrigation water from the Deschutes Basin reservoirs causes: 1) Reduced agricultural income and productivity; 2) Reduced value of in-conduit hydropower generation; and 3) Aesthetic, recreation, and lifestyle costs. In addition to these economic costs, there are also potential distributional costs of reduced water availability. These costs include: 1) Ripple effects on the local economy of reduced agricultural and hydropower production; and 2) Reduced county property tax revenues.

We need a rule that explicitly provides that critical habitat designations cannot include reservoirs, canals, ditches and other manmade structures as critical habitat.

Designating Unoccupied Areas

The Services in 2018 proposed restoring the requirement that the Secretary will first evaluate areas occupied by the species. Under the proposed amendments, the Services could only consider unoccupied areas as critical habitat if occupied areas would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species. Further, the Secretary must determine that there is a reasonable likelihood that the unoccupied area will contribute to the conservation of the species. The Alliance supported this change.

As an example, this change could be particularly helpful in determining the range of ESA-listed smelt in California's Sacramento-San Joaquin River Delta estuary (Delta). Currently, there is a dispute among some as to how close the smelt get to the Delta's Central Valley Project (CVP) pumps as part of their habitat, and due to turbidity requirements and a lack of clarity over how far the smelt live away from the pumps, the pumping levels are often limited, to the detriment of CVP irrigators who rely on those water supplies.

This could also help to prevent the recurrence in other areas of what happened in Idaho in 2010. That year, the Service proposed to designate several areas in the Boise and Payette River Basins as critical habitat for Bull Trout, even though the areas in the Payette were uninhabited. Idaho water users submitted comments opposing that proposal. Ultimately, however, the uninhabited area was designated as critical habitat. To date, Idaho water users are unaware of any Bull Trout identified in these designated uninhabited areas.

While it cannot be conclusively stated that anything "bad" has necessarily happened because of that designation (to date), the designation opens up this uninhabited area for potential issues should some litigious activist group decide to raise the matter. The designation has also opened these areas to a new, and different, world of administrative regulation and potential issues. This is unnecessary given that the area remains uninhabited.

Even though we cannot conclude that areas in the Payette River Basin would not have been designated under the 2018 proposed rule, we felt this new proposal would provide a higher threshold for such a designation – a good thing for the regulated community.

OVERVIEW OF AGENCY ACTION ON CRITICAL HABITAT

FWS and NMFS rescinded the Trump Administration’s 2020 rule that clarified the process for designating critical habitat for threatened and endangered species under Section 4 of the ESA. As further explained below, the Alliance opposed the Proposed Recission, which occurred less than a year after the agencies promulgated the 2020 regulations. That earlier effort was intended to provide “greater transparency and certainty for the public and stakeholders” regarding its critical habitat exclusion process, given the preceding Supreme Court holding in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018) (*Weyerhaeuser*) that decisions not to exclude an area from critical habitat are judicially reviewable. It was troubling to see NMFS and FWS so quickly flip-flop and find that the 2020 Final Rule is “problematic because it unduly constrained the Service’s discretion in administering the [ESA].”

1. Background

On February 11, 2016, the Services issued a joint policy describing how they implement the authority to exclude areas from critical habitat designations. On December 18, 2020, the FWS amended its portions of their regulations that implement section 4 of the ESA. The final regulation applied solely to critical habitat designated by FWS. The Final Rule set forth a process for implementing section 4(b)(2) of the ESA, which requires FWS to consider the impacts of designating critical habitat and allows the agency to exclude particular areas following a discretionary exclusion analysis subject to certain limitations. That rule provided the background for proposed revisions in terms of the statute, legislative history, and case law.

Section 4(b)(2) of the Act requires that the Service consider the economic impact, the impact on national security, and any other relevant impacts of designating any particular areas as critical habitat. It provides that FWS then may engage in further discretionary consideration and exclude particular areas from the designation if the benefits of exclusion outweigh the benefits of inclusion and exclusion would not result in extinction of the species. In the Final Rule, FWS discussed its desire to articulate clearly when and how it will undertake such an exclusion analysis under section 4(b)(2), including identifying a non-exhaustive list of categories of potential impacts for the Service to consider. The goal for the Final Rule was to clarify, based on agency experience, how FWS considers impacts caused by critical habitat designations and conducts its discretionary exclusion analyses, partially in light of the Supreme Court’s recent decision in *Weyerhaeuser*.

On January 20, 2021 – the day of his inauguration – President Biden issued Executive Order 13990, which, among other things, required all agencies to review agency actions issued between January 20, 2017, and January 20, 2021 to determine consistency with the purposes articulated in section 1 of the E.O. A “Fact Sheet” supporting the E.O. set forth a non-exhaustive list of specific agency actions that agencies were required to review. One of the agency actions included on the Fact Sheet was the December 18, 2020 Final Rule. Pursuant to the direction in EO 13990, FWS reviewed the December 18, 2020 Final Rule to assess whether to keep the rule in place or to revise any aspects of it. The agency’s review included evaluating the benefits or drawbacks of the rule, the necessity of the rule, its consistency with applicable case law, its inconsistency with NMFS’s process for applying section 4(b)(2) of the Act, and other factors. Based on its evaluation, FWS proposed to rescind the 2020 Final Rule.

2. Alliance Response and Recommendations

Congress included Section 4(b)(2) in the ESA to provide a mechanism to exclude particular areas from critical habitat, after consideration of the economic and other impacts of the designation, when the benefits of exclusion outweigh the benefits of inclusion, and exclusion of that area would not result in extinction of the species. In practice, the evaluation of critical habitat exclusions has been complicated due to a lack of transparency and consistent standards describing how the Services would assign weight to particular impacts, weigh the respective benefits of inclusion versus exclusion, and ultimately exercise their discretion regarding the exclusion of a particular area.

The Family Farm Alliance in October 2020 formally responded to the revisions proposed by FWS relative to regulations for designating critical habitat, under Section 4(b)(2) of the ESA. We generally supported FWS's revisions to clarify the scope of economic and other impacts that would be considered; to assign weight to impacts and benefits based on the expertise of the exclusion proponent and the recognition that nonbiological impacts are outside of FWS's expertise; and to always exclude an area when the benefits of exclusion outweigh the benefits of inclusion, unless extinction of the species would result.

The Alliance has long supported efforts to balance effective, science-based conservation with common-sense policy designed to bring the ESA into the 21st century. We felt the 2020 Final Rule was a strong step in this direction.

Conversely, we did not believe that transparency and regulatory certainty were promoted by FWS's latest proposal to rescind the regulations. Our belief was built upon the following observation and recommendations, which are more fully detailed in the November 2021 letter submitted to the Services by the National Endangered Species Act Reform Coalition (NESARC) on this matter¹:

- 1. The Critical Habitat Exclusion Procedures in the 2020 Final Rule Are Necessary to Provide Greater Transparency and Certainty for the Public and Stakeholders.**
- 2. FWS Failed to Provide the Requisite Reasoned Explanation for Rescinding the 2020 Final Rule.** While FWS purported to explain the basis for its change in position, the provided explanations were not well reasoned, nor did they meaningfully address the facts and circumstances supporting the recent promulgation of the procedures implanting the Section 4(b)(2) critical habitat exclusion process. The 2020 Final Rule did not undermine FWS's role in ESA implementation nor give undue weight to outside parties. The 2020 Final Rule was not overly rigid, but instead, provided the necessary regulatory framework to guide the consideration of exclusions from critical habitat. Reverting to the 2016 policy did not provide clarity or transparency to the critical habitat exclusion process. It defied logic for FWS to assert that clarity and transparency would be improved by reverting back to a policy that had already been found not to achieve those objectives because it did not contain the requisite regulatory framework.

¹ We supported that letter and incorporated it by reference into our comments to the Services.

3. FWS Failed to Provide a Reasoned Explanation for Rescinding Each of the Primary Substantive Provisions of the 2020 Final Rule.

- a. The Biden Administration’s FWS stated that the “credible information” standard was vague and did not accomplish the stated goal of improving transparency about what information would or would not trigger an exclusion analysis. In fact, the explanations provided during the promulgation of the 2020 Final Rule informed us what must be provided by proponents of a critical habitat exclusion.
- b. In the Proposed Recission, FWS stated that it had found that “the provision to automatically assign weights based on the nonbiological impacts identified by entities outside the agency does not advance the conservation goals of the Act.” In this instance, FWS disregarded its explanation in the 2020 Final Rule and misstated the scope of its statutory obligations pursuant to ESA Section 4(b)(2). The criteria for assigning weights to impacts do not constrain FWS’s authority or responsibility under the ESA.
- c. The Biden Administration’s FWS pointed to the change in treatment of Federal lands as justification for proposing to rescind the 2020 Final Rule. FWS noted that, under the 2016 Policy, the Services would generally not exclude Federal lands from a designation of critical habitat and, instead, the 2020 Final Rule applied the same standards for evaluating Federal and non-Federal lands. FWS stated that all Federal agencies have responsibilities under ESA section 7 to carry out programs for the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. Finally, FWS asserted that the 2020 Final Rule “fails to recognize that the Policy does not prohibit exclusions of Federal lands.” Unfortunately, the Biden Administration’s FWS failed to appreciate that these issues and concerns were already raised and addressed during the promulgation of the 2020 Final Rule. We believe the critical habitat exclusion process applies equally to federal and non-federal lands.
- d. The Biden Administration’s FWS found that the requirement in the 2020 Final Rule that the Secretary “shall” exclude an area where the benefits of exclusion outweigh the benefits of inclusion was an “unnecessarily broad constraint on the Secretary’s discretion,” and one that “interferes with the statute’s conservation goals by making a binding rule that ties the hands of current and future Secretaries in a particular way in all situations.” Instead of providing transparency and certainty to the regulated community, FWS was now indicating that it was preferable to “preserve the Secretary’s discretion on exclusions regardless of the outcome of the balancing.” We believe clarifying when FWS will exclude areas from critical habitat is an appropriate exercise of discretion.

- e. Since promulgation of the 2020 Final Rule, the Biden Administration’s FWS determined that the inclusion of certain “other provisions identifying factors for the Secretary to consider when conducting exclusion analyses that involve particular categories of impacts” was unnecessary, and that their removal would not affect FWS’s implementation of the ESA. FWS’s explanation was contrary to the purpose of the 2020 Final Rule, which was to “provide greater transparency and certainty for the public and stakeholders.” We believe the “other” regulatory provisions of the 2020 Final Rule should be retained.

In summary, we believe the rationale for the Biden Administration’s regulatory action was unsupported and contrary to legal precedent.

CONCLUSION

We understand the difficult issues surrounding the ability of Congress to amend the ESA. However, Congress has given the agencies considerable discretion in *how* the ESA is implemented as enacted. Given the significant scientific uncertainty with many listed species and the ecosystems in which they reside and the failure of the ESA regulators to look beyond only the federal action being consulted upon to consider the many other varied stressors affecting them, the agencies need to step back and rethink the consequences of their actions. Even though the ESA does not require the human consequences of their decisions to be considered, it does not prohibit such consideration. Understanding the impacts on people that come with ESA decisions is simply good public policy. To ignore how people are affected is simply bad public policy. This concern and others deserve further consideration from the highest policy officials.

Farmers, ranchers, and some conservation groups know that the best water solutions are unique and come from the local, watershed, and state levels. They know we need policies that encourage agricultural producers, NGOs, and state and federal agencies to work together in a strategic, coordinated fashion. They understand that species recovery and economic growth and activity do not have to be mutually exclusive.

The Family Farm Alliance developed our recommendations for the Services to help form the basis for solutions to help meet the challenges our farmers and ranchers face. It is our hope that Congress and the agencies will embrace the core philosophy previously stated: the best solutions are driven locally by real people with a grasp of “on-the-ground” reality and who are heavily invested in the success of such solutions.

We urge the Subcommittee to support H.J. Res. 46, which would restore the 2020 Final Rule, which was intended to better ensure that agency actions are clear and consistent and provide the maximum degree of regulatory predictability to those who are affected by it – like Western farmers and ranchers. Western irrigated agriculture is a strategic and irreplaceable national resource important to both our food security and our economy. It must be appreciated, valued, and protected by the federal government in the 21st Century.

Thank you for this opportunity to testify today. I stand ready to answer any questions you may have.